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Supreme Court of the United States

October Term, 1930.

No. 261.

STANDARD MARINE INSURANCE COMPANY, LTD.,
Petitioner,

vs.

SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD.,
Respondent.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI.

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BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI.

I.

Jurisdiction.

This case comes before this Court on writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit, granted by this Court October 13, 1930 (282 U. S. V.). The case is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, and involves a question of marine insurance.

The final decree of the United States Circuit Court of Appeals for the Sixth Circuit, filed April 7, 1930 (R. 97), affirmed a decree of the United States District Court for the Northern District of Ohio, Eastern Division, which appears

at pages 88-91 of the printed record. The decree of the District Court, affirmed by the Circuit Court of Appeals, distributed between the petitioner and the respondent herein, two insurers of the same cargo on the *SS. Glenorchy*, both of whom had paid a total loss under their policies, the amount awarded to that cargo against the *SS. Leonard B. Miller*, the colliding vessel, in limitation proceedings brought in the United States District Court for the Northern District of Ohio. The distribution decreed by both lower Courts between the petitioner and the respondent was not *pro rata*.

II.

The Opinions of the Courts Below.

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, printed in this record at pages 86-88, rendered under date of July 18, 1928, is reported under the title *In re Columbia S. S. Co.* in 28 Fed. (2nd) 540.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit, printed in this record at pages 97-101, rendered under date of April 7, 1930, is reported under the title *Standard Marine Insurance Co., Ltd.* v. *Scottish Metropolitan Assurance Co., Ltd.*, in 39 Fed. (2nd) 436.

The allowance of writ of *certiorari* by this Court on October 13, 1930, is reported in 282 U. S. V.

III.

Statement of the Case.

There is no dispute as to the facts. The case involves a question of law. The facts and the documents involved are stipulated in an agreed statement of facts which appears in the record (R. 41-61, incorporating petitioner's policy of insurance printed at pages 20-29). The facts are as follows:

By contract dated August 25, 1924, Louis Dreyfus & Company purchased from Canadian Co-operative Wheat Producers, Ltd., of Winnipeg, *for future delivery*, 200,000 bushels of wheat c. i. f. Montreal, at c. i. f. price of $1.38½ per bushel, making the total c. i. f. price of 200,000 bushels $277,000 (R. 42). Thereafter, on October 27, 1924, the Canadian Co-operative Wheat Producers, Ltd., shipped the 200,000 bushels of wheat in fulfillment of this c. i. f. contract on the *SS. Glenorchy* at Port Arthur for delivery at Montreal (R. 42).

This 200,000 bushels of wheat was insured by the shipper, Canadian Co-operative Wheat Producers, Ltd., at $1.42 per bushel, making a total insurance taken out by the shipper of $284,000 (R. 42). This insurance was taken out by the shipper with the Scottish Metropolitan Assurance Company, Ltd., the respondent, under the respondent's open policy dated February 22, 1924 (R. 43, Exhibit "C", 46-56), and was evidenced by two certificates of insurance issued by the respondent to the shipper, dated October 26, 1924, each certificate covering 100,000 bushels "valued at $1.42 per bushel. Shipped on board of the steamer *Glenorchy* at and from Fort William and/or Port Arthur to Montreal" (R. 43, Exhibits "D" and "E", 56-

59). The policy provided that the insurance was "for account of whom it may concern" (R. 53). The valuation in the said two insurance certificates was 3½¢ above the c. i. f. price.

The said policy defined the beginning of the risk as "beginning the adventure upon the said goods from and immediately following the loading thereof on said vessel at as per form * * *" (R. 47). The two insurance certificates were endorsed and delivered with the bills of lading to Dreyfus & Company, the buyer (R. 44).

The 200,000 bushels of wheat were shipped by Canadian Co-operative Wheat Producers, Ltd., on the *SS. Glenorchy* at Port Arthur bound for Montreal on October 27, 1924, and constituted the greater part of that vessel's cargo (R. 42, 43). The total cargo on the *SS. Glenorchy* was 208,392-40/60 bushels (R. 44). The additional 8,392-40/60 bushels remained the property of the shipper and were also covered by insurance of the respondent, but are not involved in this dispute.

Dreyfus & Company, engaged in the grain business, had, prior to the date of the sale contract in question, taken out with the petitioner an open policy of insurance on July 12, 1924 (R. 43). A copy of that open policy is printed in the record at pages 20-29. This policy provides for the coverage of two kinds of cargo. Clause 4 of the policy (R. 27) provides for the coverage of cargo which has *not* been insured by shipper. Clause 3 of the policy (see rider on policy, dated August 1, 1924, R. 25, which superseded the original Clause 3, at R. 27) provides for the coverage of cargo which *has* been insured by the shipper.

The amount of the coverage on shipments which have been insured by the shipper is described in Clause 3 (as amended by rider dated August 1, 1924), as follows:

"To cover 'INCREASED VALUE' on grain owned by the Assured or in which the Assured may have an interest, such 'INCREASED VALUE,' for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents), as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at destination as named in the Certificate, both days inclusive; and in the event of casualty to be valued at the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents) as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive. Advice of all such shipments to be mailed to the Company, 64 King Street East, Toronto, Ontario, Canada, by registered letter on day of sailing of the vessel, or as soon thereafter as practicable."

On October 29, 1924, the *SS. Glenorchy* with the above cargo on board was in collision with the *SS. Leonard B. Miller* as a result of which the *SS. Glenorchy* and her cargo sank and became a total loss (R. 41). Suit was brought by Louis Dreyfus & Company as owner of the said cargo on the *SS. Glenorchy* against the *SS. Leonard B. Miller*, and thereafter a petition for limitation of liability was filed in the United States District Court for the Northern District of Ohio, Eastern Division, by Columbia Steamship Company, as owner of the *S. S. Leonard B. Miller* (R. 1-6).

On the trial of the limitation proceedings, both vessels were held at fault, and Louis Dreyfus & Company were

awarded recovery against the *SS. Leonard B. Miller*. The amount of that recovery was fixed by agreement of the parties and was embodied in the final decree at $332,487.65, being based on the market value of the wheat *in store* at Port Arthur, the port of loading, at $1.54¾ per bushel (R. 8, 10, 44). This limitation of the amount of cargo's recovery against the *SS. Leonard B. Miller* was necessitated by the rule laid down by this Court in *The Vaughan and Telegraph* (1871), 14 Wall. 258, at pages 267 and 268. The above amount carries interest at 5% per annum from October 29, 1924.

The subject matter of the present dispute between the petitioner and the respondent is the 200,000 bushels above referred to, the recovery for which in the final decree is $309,500, *i. e.*, part of the $322,487.65 (R. 44).

In view of the shortness of time between the shipment of the cargo on October 27th and its loss on October 29th, Dreyfus & Company, as assured under the petitioner's policy, made a declaration of the shipment and a preliminary claim for loss in a letter from Dreyfus & Company's brokers to the Toronto Insurance & Vessel Agency, agent of the Standard Marine Insurance Company, Ltd., dated October 30, 1924 (R. 43; Exhibit F, 60). Final claim of Dreyfus & Company for loss under this policy is set out in Exhibit G, dated October 31, 1924 (R. 43, 60, 61).

On November 3, 1924, Scottish Metropolitan Assurance Company, Ltd., paid Dreyfus & Company the sum of $284,000, which amount was in fact due under its policy (R. 43). This payment was made on its two insurance certificates, Exhibits D and E (R. 56-59), which had in due course been endorsed to Louis Dreyfus & Company (R. 43, 44).

On November 28, 1924, the Standard Marine Insurance Company, Ltd., paid to Louis Dreyfus & Company the sum

of $62,500, which amount was in fact due from it to Dreyfus & Company under its policy (R. 44). This amount was arrived at as follows:

Highest market value on October 27th, $1.64¾ per bushel, plus 5¢	$1.69¾
C. I. F. invoice value per bushel	1.38½
Increased value per bushel	$ .31¼
200,000 bushels at 31¼¢ per bushel (R. 61).	$62,500.00

The claim on behalf of Louis Dreyfus & Company in the limitation proceedings was handled by the attorneys for the respondent, who refused to admit the petitioner's right to share *pro rata* in cargo's recovery in the limitation proceedings. After entry of final decree in those limitation proceedings, therefore, a petition of intervention was filed by the petitioner, "intervening for its interest, by subrogated rights, in the fund in Court in the above-entitled cause, represented by the bond or stipulation for value of the *SS. Leonard B. Miller*" (R. 16-20). This petition was answered by the respondent (R. 29-33). Thereafter a petition of intervention was filed by the respondent intervening for its interest by way of subrogation in the said recovery (R. 33-37). The petitioner filed an answer to that petition (R. 38, 39).

On April 20, 1927, an order was entered referring to a Special Commissioner the issues raised by the two petitions, viz., the respective rights of the petitioner and the respondent in the fund awarded to Dreyfus & Company in the limitation proceedings (R. 40, 41).

The case was submitted to the Special Commissioner on an agreed statement of facts which, with the exhibits an-

nexed thereto, appears at pages 41-61 of the printed record. The Special Commissioner in a report filed January 14, 1928 (R. 61-83), held, as contended by the petitioner, that the two insurance companies should share *pro rata* in the fund of $309,500, with interest, after payment of the expenses of litigating the claim of Dreyfus & Company in the limitation proceedings (R. 68).

Exceptions to the Special Commissioner's report (R. 84-86) having been filed, the District Court handed down its opinion on July 18, 1928, holding that the respondent is entitled to full reimbursement out of cargo's recovery, the petitioner to receive only the balance. The final decree (R. 88-91), in accordance with the District Court's opinion, provides that there be paid to the respondent out of cargo's recovery the sum of $284,000, with interest at the rate of 5 per cent. per annum from October 29, 1924; that the Commissioner's fee in the sum of $1,245 be then paid from the fund; and that the petitioner receive the balance of said fund (R. 90, 91).

If cargo's recovery is to be pro rated, the petitioner will receive approximately $55,000; but if the petitioner is to receive only the balance of the fund after the respondent has been reimbursed in full, the petitioner will receive only approximately $25,000.

IV.

Error Assigned by Petitioner.

The petitioner assigns error to the opinion and decree of the United States Circuit Court of Appeals for the Sixth Circuit in that said Court held

1. That the respondent should be paid $284,000, the full amount of its insurance, with interest, out of the fund of $309,500 recovered by the insured cargo against the *SS. Leonard B. Miller* in the limitation proceedings, and that the petitioner should receive only the balance of that fund remaining after such payment.

2. That the distribution of said fund should not be made *pro rata* between the petitioner and the respondent in proportion to the amounts of insurance paid by them respectively to Dreyfus & Company, the owner of said cargo.

The above assignments of error were argued in the Circuit Court of Appeals (R. 92, 93).

V.

Argument.

FIRST POINT.

The petitioner's insurance was insurance on cargo, and on actual value thereof. The Courts below erred in holding to the contrary.

In its opinion the District Court held:

> "Despite the language of the Standard policy, it was not in fact or law insurance upon the cargo, but upon the price at the point of delivery, for the loss of which there was no recovery by the owner of the cargo against the offending ship and, therefore, no subrogation.
>
> The indemnity provided by the Standard policy did not cover the character of loss for which recovery could be had by the owner against the Miller, and, therefore, the Standard Company is not entitled to pro-rate with the Scottish Company in the distribution of a fund representing actual value at the time and place of shipping. I think the Scottish Company entitled to full payment from the fund" (R., 87, 88).

In its opinion the Circuit Court of Appeals said:

> "We agree with the District Court that under the principles of subrogation as applied to the circumstances of this case the appellee is entitled to be paid from the fund in controversy the full amount which it paid to the insured and that after payment of said amount and of the Commissioner's fee already mentioned from such fund, the appellant is entitled only to the balance thereof" (R., 101).

The petitioner's insurance was insurance on cargo. The petitioner's policy (R. 20-29) bears the words "LAKE CARGO" on the upper left-hand corner of the first page.

The first paragraph of the policy reads:

> "Do make insurance and cause * * * to be insured *upon all kinds of Lawful Goods, Wares, Merchandise and Produce* laden on board the good vessel or vessels, etc." (R. 21);

and the second paragraph of the policy reads:

> "Beginning the adventure *upon the said property*, etc." (R. 21). (Italics ours.)

After quoting this language of the policy, the Special Commissioner had said:

> "This language would seem to indicate that the thing insured by the Standard Marine Insurance Company was also a cargo of grain" (R. 78).

The petitioner's policy provides for the coverage of two kinds of cargo: First, cargo which has *not* been insured by the shipper, and, second, cargo which *has* been insured by the shipper. Typewritten clause 4 of the policy (R. 27) provides the amount of the insurance coverage on shipments which have not been insured by the shipper, such shipments to be valued at an amount to be declared prior to sailing. That clause reads as follows:

> "To cover all shipments of grain owned by the assured, or in which the assured may have an interest and *not insured by the shipper*, such shipments to be valued, for the purposes of this insurance, at amount declared, such amount declared and advices of such shipments to be mailed to the company, 64 King Street, East, Toronto, Ontario, Canada, by registered letter prior to sailing of the vessel" (R. 27). (Italics ours.)

Typewritten clause 3 (the first rider on the policy, dated August 1, 1924 R. 25), provides for the amount of coverage on shipments which *have* been insured by the shipper (that is c. i. f. shipments). Clause 3 reads:

> "To cover 'INCREASED VALUE' on grain owned by the Assured or in which the Assured may have an interest, such 'INCREASED VALUE' for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents) as set out in the New York Journal of Commerce, between the day of sailing of the vessel at point of shipment and the day of final delivery of the complete cargo at destination as named in the certificate, both dates inclusive; and in the event of casualty, to be valued at the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents) as set out in the New York Journal of Commerce between the day of sailing of the vessel at point of shipment, and the day and the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive. Advice of all such shipments to be mailed to the company, 64 King Street, East, Toronto, Ontario, Canada, by registered letter on day of sailing of the vessel, or as soon thereafter as practicable" (R. 25).

The use of the words "increased value" in clause 3 of the policy was necessary to properly describe the *amount* of the coverage where the shipper had, under its c. i. f. contract, taken out insurance to the extent of the c. i. f. price.

The differing provisions of clause 4 and clause 3 of the petitioner's policy do not change the *kind* of insurance; they simply provide for a different *amount* of the same kind of insurance, *i. e.*, insurance on cargo. The Commissioner pointed this out at pages 80, 81 of the record.

Dreyfus & Company, engaged in the business of purchasing grain under c. i. f. contracts, cannot compel the sellers and shippers of such grain to insure it for more than the c. i. f. price. *Tanvaco* v. *Lucas*, (1861) 30 L. J. (N. S.) 234; affirmed (1862) 31 L. J. (N. S.) 296. Moreover, Dreyfus & Company do not know with what company the sellers carry their insurance. The grain is not shipped until some time after the date of the c. i. f. contract. In the present case the grain was not shipped until two months after the contract. As, therefore, the *actual market value* of the grain, when it becomes the property of Dreyfus & Company on shipment some time after the date of the contract of sale, is in excess of the c. i. f. *price*, Dreyfus & Company carried the open policy with the petitioner for insurance on cargoes to the extent of this "increased value". As Dreyfus & Company could not call on the seller to insure for more than the c. i. f. price, Dreyfus & Company's insurance with the petitioner on "increased value" was the *only way* whereby Dreyfus & Company could keep those shipments of grain which were made to them under c. i. f. contracts, fully covered by insurance.

If Dreyfus & Company had been both shipper and consignee, Dreyfus & Company could, as the value of wheat increased, have arranged with their insurer to increase the valuation in its policy; the insurance would then have been in one company, and following the sinking of the cargo that insurance company would have been subrogated to the cargo's rights against the *SS. Leonard B. Miller*. The fact that, from the necessity of the case, Dreyfus & Company were obliged to take out insurance in another company to cover the cargo to the extent of the increase in value of the wheat cannot change the fact that both insurances were on cargo.

To make the matter clear, it is necessary to point out the various prices and/or values of the cargo per bushel, as follows:

Invoice *price*, c. i. f. Montreal, fixed by contract of August 25, 1924	$1.38½ per bu.
The *valuation* agreed on in the shipper's insurance under its open policy with the Scottish Metropolitan Co.	1.42 " "
The *actual market value* of the wheat *at the port of shipment* on October 27, 1924, the date of shipment, two months after the date of contract of sale	1.54¾ " "
The above *market value* at port of shipment was 16¼ cents above the contract *price*.	
The *market value*, as quoted in the New York Journal of Commerce on October 29, 1924	1.64¾ " "
Add $.05 to the above, as per clause 3 of petitioner's policy	1.69¾ " "
The amount of insurance on the cargo covered by the petitioner ($1.69¾ less $1.38½)	.31¼ " "

Both respondent's and petitioner's insurance were based on a price which contemplated delivery at Montreal. The respondent's insurance was based on a "c. i. f. Montreal" price of $1.38½ plus $.03½. It was not based on a spot price at port of shipment; it included the cost of transportation to Montreal. The petitioner's insurance was likewise based on a c. i. f. Montreal value, but at a subsequent date, "as quoted in the New York Journal of Commerce," plus $.05.

The additional 5 cents, which made up the valuation and limit of coverage in the petitioner's policy was obviously to

provide for a slight margin in case there was a slight error between the New York *quotation* and the *actual market value* of the cargo en route to Montreal. It should be noted that this 5 cents was 3 per cent. of the market value as quoted in the New York Journal of Commerce, and does not make the insurance speculative any more than the additional 3½ cents above the contract c. i. f. price (3½ cents is 2½ per cent. of the c. i. f. price) in the respondent's policy makes that policy speculative.

That the petitioner's insurance on Dreyfus & Company's cargo was insurance on actual value, is perfectly clear if we assume that Dreyfus & Company were going to use the cargo to fill a contract for export shipment from Montreal. Assuming that such was the case, then Dreyfus & Company, on the loss of the *Glenorchy* on October 29, 1924, would be obliged to replace the lost cargo, and in purchasing another cargo to replace the lost cargo, Dreyfus & Company would be obliged to pay the then market value of grain, which market value according to the quotation in the New York Journal of Commerce was $1.64¾ per bushel. There can be no doubt that that was the *minimum* actual market value of the grain on the date of the loss, and that at least that much would have had to be paid to replace the cargo which was lost. *The grain could not be replaced at c. i. f. contract price of August 25, 1924.*

The Courts below erred in reasoning that because the valuation in the petitioner's policy was a figure greater than the value at the point of shipment, whereas the award to Dreyfus & Company, as owner of the cargo, against the *SS. Leonard B. Miller* was limited by law to the market value at the point of shipment, the petitioner's insurance was not on the cargo but on the price at the point of delivery; and that, therefore, the petitioner did not have an equal right of subrogation with the respondent.

The limit of legal recovery in favor of the cargo owner against the *SS. Leonard B. Miller* has been fixed by decisions of this Court and the lower Federal Courts as the market value at the point of shipment on the day of shipment, plus the expenses of getting the cargo to the point of sinking. *The Vaughan and Telegraph* (1871), 14 Wall. 258, 267; *The Ocean Queen* (1867, C. C. S. D. N. Y.), 5 Blatch. 493; *The Aleppo* (1874, D. C. S. D. N. Y.), 7 Ben. 120, 129, 130; *The Oceanica* (1907, D. C. W. D. N. Y.), 156 Fed. 306, 307. There is, however, no connection between that rule of law, which limits the amount of recovery against a wrongdoing vessel, and the rights of subrogation to the fund representing that recovery.

Both lower Courts have treated the petitioner's insurance as though it were insurance, not on cargo, but on the cargo owner's ability to collect up to $1.69¾ per bushel from a wrongdoer.

As Dreyfus & Company, in order to replace the lost cargo would have to pay at least $1.64¾ per bushel, it seems clear that certainly up to that amount, even if not to the full $1.69¾ the petitioner's policy was insurance on *actual value* of the wheat. The fact that the value on delivery at Montreal would probably have been approximately the same as the value *en route,* does not make the petitioner's policy insurance upon the price on delivery any more than the respondent's policy, which was based on a "c. i. f. Montreal," *i. e.,* delivered at Montreal price.

The holding of the lower Courts in this case amounts to this:

Suppose goods worth $200,000, insured by the shipper under a c. i. f. contract for $150,000 in insurance company A, and insured by the purchaser for $50,000 on increased value in insurance company B, are totally destroyed in

transit and the carrier is liable, but because of the bill of lading valuation clause the recovery against the carrier is limited to $100,000. The lower Courts on their reasoning would hold that insurance company B had no subrogated rights to the fund recovered against the carrier, because the owner of the goods could not recover against the carrier more than $100,000. That proposition is clearly untenable.

It therefore seems clear that the petitioner's insurance on increased value was insurance *on the cargo*, and on the *actual value* of the cargo, which value was greater in October, 1924, than the c. i. f. contract price of August 25, 1924, two months earlier. The petitioner's insurance was not insurance on the price at the point of delivery, but was insurance on the value of the cargo day by day as a cargo *en route* to Montreal, on which the consignee would not have to pay any freight.

Both Courts below erred in their view of the legal effect of the "valuation" in the respondent's certificates. In its opinion the District Court said:

> "The Scottish Company issued its policy on the cargo of wheat for the full value of the wheat at an agreed full valuation of $284,000" (R. 86).

The fact that the respondent's certificates of insurance stated the valuation of the 200,000 bushels as $284,000 merely means that the respondent's *limit of liability* in case of total loss was $284,000; just as the valuation in the petitioner's policy means that the petitioner's *limit of liability* in case of total loss was the difference between the c. i. f. price and the highest market price, plus five cents, as quoted in the New York Journal of Commerce between the day of sailing and the day the cargo would have arrived at destination if casualty had not occurred. The

Courts below apparently felt that the valuation in the respondent's policy gave it a prior right of subrogation over the petitioner, but it is clear that in both policies the valuation merely fixes the maximum liability in case of total loss, a proposition which has been clearly and definitely settled by this Court.

In the decision of this Court in *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co.* (1929), 279 U. S. 708, Mr. Justice STONE, in delivering the opinion of the Court, said at page 712:

> "The policy agreement valuing the cargo at a specified amount is not a representation, or so regarded. It is no more than a *stipulation*, in effect, that *for purposes of computation of the insurance liability* the cargo shall be taken at an agreed value." (Italics ours.)

The "valuation" in the respondent's certificates did not establish the value of the cargo; it merely fixed the limit of respondent's liability in case of loss.

The petitioner's insurance was insurance on cargo, and on actual value thereof.

SECOND POINT.

The petitioner's insurance was not insurance on profits.

In the Courts below, the respondent argued that the insurance provided for in Clause 3 of the petitioner's policy was not insurance on cargo, but was insurance "on profits", and cited *Canada Sugar Refining Co.* v. *Insurance Co. of North America*, (1900) 175 U. S. 609. In that case, how-

ever, the policy expressly described the insurance as "$15,000 *on profits* on cargo sugar; against total loss only; valued at the sum insured" (p. 613). In that case and the other cases involving insurance on profits—*The Patapsco Insurance Co.* v. *Coulter*, 3 Peters, 222, and *O'Brien* v. *North River Insurance Co.* (1914 C. C. A. 4 C.) 212 Fed. 102, the policy expressly described the insurance as being "on profits". Those decisions all point out that insurance "on profits", although legal, is *speculative insurance*, there being no burden on the assured in case of loss to show that there was in fact any market at the point of destination.

There was nothing speculative about the insurance provided for in Clause 3 of the petitioner's policy. The amount of insurance provided by that clause was based on *real value*, and actually fluctuated up and down according as the New York quotation of the market increased or decreased. No method of arriving at a valuation could more closely approximate *actual value* than the provision in Clause 3 of the petitioner's policy.

In its briefs in the Circuit Court of Appeals, and in opposing application for writ of *certiorari* in this Court, the respondent cited the English case of *Strass* v. *Spillers & Bakers, Ltd.*, L. R. (1911) 2 K. B. 759, and quoted from the opinion in that case certain language to the effect that policies on increased value are not the *ordinary kind* of cargo policies. The case, however, does not hold that policies on increased value are not cargo policies, but to the contrary, the facts stated in the opinion show that the policies on increased value on a cargo of grain were paid their proportion of loss as were the usual form of cargo policies, *the only question decided being who was entitled to the amounts paid under the increased value policies*. The facts were that by contract dated December 30, 1908, the defen-

dants bought from Dewar & Webb a cargo of wheat c. i. f. the contract providing "seller to give policies of insurance (free of war risk) for 2% over the invoice amount, and any amount over this to be for seller's account, in case of total loss only". On February 2, 1909, the plaintiff by contract in similar terms purchased from Messrs. Allatini a cargo of wheat of the same crop per the sailing ship *Leon Bureau* and received from Messrs. Allatini a policy on the cargo for £21,300 dated February 16, 1909. The market price of wheat having risen since February 2d, the plaintiff on February 9th effected a policy on increased value of the wheat for £2,000 with the London Assurance Corporation and a second increased value policy on February 27 for £2,000 with the British & Foreign Marine Insurance Co. These increased value policies were without benefit of salvage and were warranted free from average unless general, or the ship be stranded.

On March 16, 1909, the plaintiff re-sold the cargo to Messrs. Allatini at an increase in price and on the same day Dewar & Webb bought the cargo from Messrs. Allatini in order to fulfill their contract of December 30, 1908, with the defendants. In view of the increase in contract price, the plaintiff was obliged to hand to Messrs. Allatini on re-sale to them additional insurance to the extent of £1508. He therefore had the increased value policy of the British & Foreign Marine Insurance Company divided into two policies of £1508 and £492 and handed to Messrs. Allatini the policy for £1508, retaining the one for £492 as well as the increased value policy for £2000 effected with the London Assurance Corporation.

On the voyage the carrying vessel struck a rock and had to be beached, and in consequence the cargo sustained a particular average and a general average loss. Adjustment

was made and the losses were paid on the policies handed over to Dewar & Webb and by them handed over to the defendants, but these policies did not include the two retained by the plaintiff, namely, the increased value policies for £2000 and £492, respectively.

Subsequently, the plaintiff sent those two policies to Messrs. Allatini to be sent by them to the receivers of the cargo for presentation to the adjuster; and following this, the underwriters paid to the defendants under those policies £524 and £128, respectively; and the defendants refused to turn those amounts over to the plaintiff.

The Court pointed out that because of the particular terms of the two policies in question they were "not in the ordinary sense a mere insurance on cargo; and to pay in case of general average not *pari passu* with all other portions of the cargo and all *other policies on cargo*, but only in a particular way; it is warranted free from particular average; and finally it is without benefit of salvage" (p. 768).

The Court did not hold that the "increased value" policies were not insurance on cargo. All it held was that the two policies in question belong to the plaintiff and not to the defendants, and it should be noted that the "increased value" policy for £1508, which was not the subject of suit, but which had been handed to the defendants together with the *other policies on cargo*, received its share of loss payment with the *other cargo policies*. The two "increased value" policies which were the subject of the suit likewise were paid by the underwriters as cargo policies. *The only question decided by the case was the person entitled to the proceeds of those two particular "increased value" policies.*

The respondent also cited in the Court below the case of *Loders and Nucoline, Ltd.*, v. *The Bank of New Zealand*

(1929, Kings Bench Division) reported only in 33 Lloyd's List Law Reports 70. All that case held was that under a c. i. f. contract for the sale of copra, which called for insurance by the seller in the sum of £8587/10 the seller did not fulfill his obligation by tendering to the buyer policies on cargo to the extent of £7612/10 and additional policies for £975 on "freight payable at destination", merely by having the last mentioned policies worded:

> "on freight payable at destination, being increased value of copra through payment of freight or from such time as freight becomes due at destination, this insurance being deemed to be part of the total amount insured on the copra valued at such total amount."

The vessel was lost on the voyage, and as the freight was not due by the bills of lading until delivery at destination, the buyers were not able to collect from insurers on the £975 on "freight payable", and the sellers were therefore held liable to make good this deficiency of insurance. There is nothing in that case which bears on the present case.

The petitioner's insurance was not insurance on profits, but on cargo.

THIRD POINT.

Whether the respondent's insurance was prior insurance as compared with the petitioner's insurance is immaterial. Both petitioner and respondent paid a total loss, which was due, under their respective policies on the cargo, as is expressly stated in the agreed statement of facts.

In its opinion the Circuit Court of Appeals, after referring to the respondent's policy, states:

> "*Thereafter,* the insured obtained from the appellant (petitioner) insurer additional insurance upon this wheat" (R. 98) (Italics ours);

and,

> "The second insurer, the appellant (petitioner), promptly and *voluntarily* paid the insured insurance on the basis of the difference between the c. i. f. invoice cost, $1.38½ per bushel, and the highest market value, etc." (R. 99). (Italics ours.)

The respondent also argued in its brief in opposition to the petition for *certiorari,* that the petitioner's insurance was subsequent in time.

Both policies contain the familiar American Clause. That clause in the petitioner's policy reads:

> "Provided always, and it is hereby further agreed, that if the said insured shall have made any other insurance upon the property aforesaid, prior in date to this policy, then this Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured; and this Company shall return the premium upon so much of the sum

by them insured as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said Property, subsequent in date to this Policy, this Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no subsequent insurance had been made" (R. 22).

The clause in the respondent's policy reads:

"Provided Always, and it is hereby further agreed, that if the said Insured shall have made any other insurance upon the goods aforesaid, prior in day of date to this Policy, then the said Assurers shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the goods hereby insured; and the said Assurers shall return the premium upon so much of the sum by them insured, as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said goods subsequent in date to this Policy, the said Assurers shall nevertheless be answerable for the full extent of the sum by them insured without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made. Other insurance upon the goods aforesaid, of date the same day as this Policy, shall be deemed simultaneous herewith; and the said Assurers shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance."

The respondent's open policy, issued originally to Alberta Co-Operative Wheat Producers, Ltd. (R. 46-56) is

dated February 22, 1924 (R. 51), and was assigned to Canadian Co-Operative Wheat Producers, Ltd. September 10, 1924 (R. 43). The petitioner's open policy issued to Dreyfus & Co. (R. 20-29) is dated July 12, 1924 (R. 29).

The respondent's certificates covering the 200,000 bushels of wheat (Exhibits D and E, R. 56-59) are dated October 28, 1924. In view of the shortness of time between shipment of the cargo and its loss, no insurance certificate was issued by the petitioner.

The respondent's open policy is "for account of whom it may concern" (R. 53), and defines the risk on shipments as "beginning the adventure upon the said goods *from and immediately following the loading thereof on said vessel* * * *" (R. 47), and the respondent's certificates issued under that policy specifically describe the cargo covered as "shipped on board of the Steamer *Glenorchy at and from* Fort William and/or Port Arthur to Montreal via Port Colborne" (R. 57 and 58).

The petitioner's open policy defines the risk on shipments as "beginning the adventure upon the said property *from and immediately following the loading thereof* at the port or place named in the endorsement" (R. 21).

It is thus clear from the express terms of both policies that both insurances attached at the same moment, namely, the completion of the loading of the cargo on the *SS. Glenorchy.* Even if, for the sake of argument, it should be held that the respondent's insurance was prior insurance, that did not relieve the petitioner from the legal duty of paying a total loss under its policy, because payment of both insurances was necessary in order to "fully cover the property hereby insured".

The complete insurer to the respondent's argument about prior insurance is, that *typewritten* clause 3 in the petitioner's policy (R. 25) expressly deals with c. i. f. ship-

ments, *i. e.*, shipments where the shipper *must* provide insurance up to the c. i. f. price; and clause 3 expressly defines the amount of insurance covered by the petitioner in such cases, viz., "the difference between the c. i. f. invoice cost and the highest market value per bushel, plus 5¢ (five cents) as set out in the 'New York Journal of Commerce', etc."

The situation is one where two insurers of the same cargo have paid the owner of the cargo for a total loss under their respective policies. The petitioner was legally obligated to pay the assured, and did not, as the Circuit Court of Appeals suggested, pay as a volunteer. It is expressly stipulated in the agreed statement of facts that the respondent paid $284,000 which was in fact due from it to Dreyfus & Co. (R. 43); and likewise the petitioner paid $62,500 which was in fact due from it to Dreyfus & Co. (R. 44).

The case before the lower Courts, as now before this Court, is one where both insurers were obliged to pay, and did pay, to the assured, the owner of the cargo, a total loss under their respective policies.

In *Brown, et al.* v. *Merchants' Marine Insurance Co., Ltd., et al.* (1907 C. C. A. 9 C.) 152 Fed. 411, the Court, quoting Arnold on Marine Insurance, said at page 413:

> "Upon abandonment each of the underwriters participates in the benefits of the transfer by sharing in the proceeds of the salvage according to the proportion which the amount of his subscription bears to the whole value of the thing insured, *and this without regard to the date of the different subscriptions, or the priority of the policies, if more than one.*" (Italics ours.)

FOURTH POINT.

Where underwriters have paid the insured a total loss under their policies, the underwriters on "increased value" share pro rata with other underwriters in the fund recovered from the wrongdoer.

We have already pointed out at page 13 that if Dreyfus & Company had been both shipper and consignee, they could, as the value of wheat increased, have arranged with their insurer to increase the amount of its policy; the insurance would then have been in one company, and following the sinking of the cargo, that insurance company would have been subrogated to the cargo's rights against the *SS. Leonard B. Miller.* The fact that, from the necessity of the case, Dreyfus & Company were obliged to take out insurance in another company *to cover the actual increase in market value of the wheat* on its becoming their property, cannot change the fundamental principle of subrogation, viz.: in the case of a single insurer, it steps into the shoes of the assured vis-a-vis the wrongdoer; if more than one insurer covers the property they *jointly* step into the shoes of the assured vis-a-vis the wrongdoer. In the supposed instance, the single insurance company would have had the entire rights of subrogation against the *SS. Leonard B. Miller;* in the actual facts of this case, the two insurance companies are jointly subrogated to those rights, and jointly share in the fund recovered from the wrongdoer.

Assignment of the assured's rights against the wrongdoer who has caused the loss follows automatically on payment of the loss by insurer or insurers without the necessity of a formal document of assignment. *Federal Insurance Co. et al.* v. *Detroit Fire & Marine Insurance Co. et al.*

(1913 C. C. A. 6 C.) 202 Fed. 648, at page 651, *certiorari* denied 229 U. S. 620. In the present case, however, the policies of both petitioner and respondent contained an express subrogation clause in the following language:

> "It is also understood and agreed, that in case of loss or damage under this policy, the assured, in accepting payment therefor, thereby and by that act assigns and transfers to this company *all his or their right for loss or damage, as against the carrier or other person or persons*, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by this Company" (R. 23 and 49). (Italics ours.)

The principle that where several insurers pay a loss on the same property they are jointly subrogated to the rights of the assured against the wrongdoer who has caused the loss, and jointly share in the fund recovered from the wrongdoer, is true not only as a matter of principle, but also of precedent. The decision in the present case is in direct conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Brown et al.* v. *Merchants Marine Insurance Co., Ltd., et al.* (1907 C. C. A. 9 C), 152 Fed. 411, where that Court held that where underwriters have paid the insured a total loss under their policies, the underwriters on "increased value" share *pro rata* with other underwriters in the fund recovered from the wrongdoer.

No case has been found *contra*.

In that case, the *SS. City of Kingston* was insured by various insurance companies against all risks under separate policies, in each of which the vessel was valued at $75,000. Two other insurance companies issued to the owners of the *SS. City of Kingston* two policies aggregating

$12,200 "on disbursements and/or increased value," the insurance being against total loss only and warranted free from all average and salvage charges, and containing a policy proof of interest clause. In addition to all of the above policies the St. Paul Fire & Marine Insurance Company insured the vessel in the sum of $4,800 against total loss only, no valuation being inserted in that policy.

During the pendency of all of the above policies, the *SS. City of Kingston* was in collision with the *SS. Glenogle*, and was sunk. All of the underwriters on hull, together with the St. Paul Fire & Marine Insurance Company, paid a total loss and at the request of these underwriters the owner of the *SS. City of Kingston* brought suit to recover damages from the owners of the *SS. Glenogle*. On the trial, the Court found the actual value of the *SS. City of Kingston* was $140,000, that both vessels were in fault, and decreed division of damages. The result was that $67,472.96 was paid into court for the owners of the *SS. City of Kingston*. After payment of costs of the suit, the net amount left in the registry of the court was $47,426.97, for distribution among the insurance companies who were entitled to receive the same.

At this point, the two insurers "on disbursements and/or increased value" intervened, alleging that they had paid a total loss and were entitled to share *pro rata* with all the other underwriters in the fund in court. The District Court sustained this position and made *pro rata* distribution of the funds to all the underwriters.

On appeal the decision was affirmed, the Circuit Court of Appeals expressly overruling the contention of the hull underwriters that because they had insured the *SS. City of Kingston* in the sum of $75,000 *in policies which valued her at that sum*, they were entitled to be subrogated to

that amount in the award to the owner of the *SS. City of Kingston* and the contention that the insurers on "disbursements and/or increased value" were not entitled to share in the fund.

At page 413, the Circuit Court of Appeals said:

> "The assured in the policies issued by the appellees was in fact the owner of the property insured, and could undoubtedly have recovered on the policies. Such being the case, we are unable to discover any recognized principle of law or equity on which it should be held that the appellees are not entitled to rank equally with the other underwriters in the distribution of the fund in court. No ground for discrimination against the appellees can be found in the fact that the policies which they issued covered 'disbursements.' The object of insurance on disbursements is to insure the shipowner the recovery of additional sums beyond the amount covered by his insurance on ship and freight, and it is made against total loss only. Arnould, Marine Ins., Sec. 247. In International Navigation Company v. Atlantic Mutual Insurance Co. (D. C.), 100 Fed. 304, Judge Brown said that policies on disbursements are in very common use, and are 'designed to cover a variety of interests not covered by policies in the ordinary form, including moneys which have gone into the construction of the hull and equipment and sunk in depreciation * * * 'Disbursement' policies are often issued where the hull is fully covered by other policies.' *And, since the appellees could, as we have seen, have been compelled to pay the loss under their policies, they are not, as suggested by the appellant, mere volunteers in paying the same and therefore to be denied the right of subrogation.* Nor do we see that their delay in paying or their refusal to participate in the proceeding to recover damages from the owners of the *Glenogle* should be

held to be ground for excluding them from participation in the fund. *Subrogation results by operation of law from the mere act of the payment of the loss,* and does not depend on the voluntary act of the assured. Phoenix Ins. Co. v. Erie Transportation Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; St. Louis, etc. Railway v. Commercial Ins. Co., 139 U. S. 223, 235, 11 Sup. Ct. 554, 35 L. Ed. 154. In the *Livingstone,* 130 Fed. 746, 65 C. C. A. 610, the amount in controversy was recovered by the unaided effort of the owners, and against the active opposition of the intervening underwriters. It was held, notwithstanding this fact, that the interveners were entitled to subrogation. We find the general doctrine applicable to this case in Arnould, Marine Ins. Sec. 1215, where it is said:

> 'Upon abandonment each of the underwriters participates in the benefits of the transfer by sharing in the proceeds of the salvage according to the proportion which the amount of his subscription bears to the whole value of the thing insured, *and this without regard to the date of the different subscriptions, or the priority of the policies, if more than one.*'

We find no error in the decree of the District Court. It is accordingly affirmed." (Italics ours.)

The award to the insurers on "disbursements and/or increased value" was $4,132.92 (p. 412). The calculation of that award, although not worked out in the opinion, is necessarily as follows:

Valued hull policies	$ 75,000.00
Disbursements and/or increased value insurance	12,200.00
Unvalued hull policies	4,800.00
Owner, co-insurer for	48,000.00
The total interests in the vessel	$140,000.00

There was $47,426.97 for distribution.

The disbursements and increased value insurance received

$$\frac{12,200}{140,000} \times \$47,426.97 = \$4,132.90$$

If in the present case of *The Glenorchy,* the same law and the same method of calculation had been applied, the result would be:

Valued policy of Scottish Company	$284,000.00
"Increased value" policy of Standard Company	62,500.00
Total interests in the 200,000 bushels of wheat	$346,500.00

There is $309,500 for distribution.

The "increased value" insurance should receive

$$\frac{62,500}{346,500} \times \$309,500 = \$55,826.10$$

exclusive of interest.

Under the decree of the Circuit Court of Appeals as it now stands, the petitioner will receive only about $25,000.

Brown v. *Merchants Marine Ins. Co., Ltd.,* was cited with approval in *Federal Insurance Co. et al.* v. *Detroit Fire & Marine Insurance Co. et al.* (1913, C. C. A., 6 C), 202 Fed. 648, *certiorari* denied 229 U. S. 620.

In *Federal Insurance Co. et al.* v. *Detroit Fire & Marine Insurance Co. et al.,* the *SS. Etruria* was in collision with the *SS. Amasa Stone* and as a result of suit, it had been held both vessels were to blame and damages were divided. The collision resulted in the total loss of the *Etruria* and her cargo. At the time of her loss, the *Etruria,* was insured in

sixteen companies, holding risks in varying sums amounting to an agreed valuation, and the shipowner was paid such value by the insurers. The cargo and pending freight was separately insured by two of these underwriters, and these losses were likewise paid. Thereupon eight of these insurers (including the insurers of cargo and freight) requested, and eight of them declined to request, the owner of the *Etruria* to bring the suit which resulted in settling the question of liability.

After the decree on mandate was entered in the District Court those eight insurers who had not requested the bringing of the suit filed intervening petitions in the District Court demanding that they receive out of the recovery in favor of the owners of the *Etruria,* their *pro rata* amount. The District Court thereupon ordered the fund to be distributed so that the claims of the insurers who had joined in the request to bring the suit should be paid in full and after payment of such sums the remainder of the fund to be paid to the non-requesting underwriters *pro rata.* Under this decree the non-requesting underwriters would have received only a small percentage of the amounts they had paid to the owners of the *Etruria.* The non-requesting underwriters appealed.

The Circuit Court of Appeals held that the execution of a subrogation receipt was not necessary in order to give an underwriter subrogation rights, saying at page 651:

> "Most of the insurers obtained subrogation receipts from the owner upon paying their shares of its loss, some of which in terms provided for full subrogation and others 'to the extent only and as provided for' in the policies, although the policies do not appear to have contained any provision for subrogation. However, we do not regard this as important, nor do counsel for either side because it is settled that such

provisions are not necessary. The right of subrogation arises from the very nature of the contract of insurance as a contract of indemnity. *Phoenix Insurance Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 321; *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U. S. 462; *North England Ins. Assn.* v. *Armstrong*, L. R. 5 Q. B. 244; *Comegys* v. *Vasse*, 1 Peter 193, 212."

And again at page 652:

"Admittedly, the subrogation rights of all the insurers of the *Etruria* were, when acquired, entitled to equal protection; but it is urged that the non-consenting insurers destroyed this equality by waiver."

The Court held that the refusal to request the bringing of the suit was not a waiver of the non-consenting underwriters' subrogated rights, saying at page 654:

"The owner sought to recover and did recover (to the extent allowed) the proportionate shares alike of all the insurers. True, it did so in its name as owner, but at last in virtue of its Trusteeship respecting such shares."

In holding that all the insurance companies who had paid should share *pro rata* in the fund, the Court held in conclusion at page 657:

"That the claims of all the insurers of the *hull* (of the *Etruria*) appellees and appellants alike, must be placed on an equality; and the claims for *freight* and crew will be placed on a parity with them."

The Commissioner correctly held in his Fifth conclusion of law (R. 68) that the petitioner is entitled to share *pro rata* with the respondent in the $309,500 awarded to Dreyfus & Co. as owner of the 200,000 bushels of grain. The Courts below erred in reversing this holding.

Conclusion.

The petitioner paid a total loss under its policy, namely, $62,500. The respondent likewise paid a total loss under its policy, namely, $284,000. The total payments by the two insurance companies were $346,500. Cargo's recovery in the collision litigation, as respects the 200,000 bushels of wheat, was $309,500.

Both insurances were insurance on cargo.

Both open policies contained a clause in identical language providing that on accepting payment of loss thereunder, the assured thereby assigned to the insurer all the assured's right to claim for loss or damage against any other person.

The two insurance companies by virtue of their payments of a total loss under their respective policies were *jointly* subrogated to cargo's rights against the *SS. Leonard B. Miller,* and to the fund recovered by cargo against that vessel.

There are no degrees in subrogation.

The two insurance companies have by mutual agreement taken care of the expenses of creating the fund of $309,500, so that this Court can disregard any deduction for the expenses of that litigation.

It is clear on principle and authority that the two insurance companies should share *pro rata* in the fund of $309,500. The award to the petitioner should be 62,500/346,500ths of $309,500, with accrued interest. The award to the respondent should be 284,000/346,500ths of $309,500, with accrued interest.

By the decree of the District Court, the Commissioner's fee of $1,245 was taken out of that part of the fund awarded to the petitioner (R. 90). As the refusal of the

respondent to recognize the petitioner's rights to *pro rata* distribution of the fund made necessary the litigation over the distribution of that fund, the Commissioner's fee should be deducted from the respondent's recovery.

The decree of the Circuit Court of Appeals should be reversed, with instructions to pro rate between the petitioner and the respondent the $309,500 with interest.

Respectfully submitted,

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